USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: MAR 29 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADOLFO GARCIA-DEVARGAS and ILDEFONSO LOPEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

JOSEPH MAINO, individually and d/b/a Handbags 100 King Street, 119 FASHION WHOLESALERS LTD., DEBORAH MAINO and MARISA MAINO,

Defendants.

MEMORANDUM DECISION AND ORDER

15 Civ. 2285 (GBD) (JLC)

GEORGE B. DANIELS, United States District Judge:

Plaintiffs Adolfo Garcia-Devargas and Ildefonso Lopez (together "Plaintiffs") filed this action against Joseph Maino, individually and doing business as Handbags 100 King Street, and 119 Fashion Wholesalers, Ltd.[1] (together "Defendants") for alleged violations of the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206, 215, and the New York State Labor Law ("NYLL"), N.Y. Lab. L. §§ 650 *et. seq*. (Compl., ECF No. 1; Am. Compl., ECF No. 4.) Plaintiffs also claim violations of the NYLL's spread-of-hours provisions. *Id.* Plaintiffs moved for summary judgment as to overtime wage violations under the FLSA and NYLL, and for liquidated damages.[2] (Pl. Mem. in Supp. of Mot. for Summ. J. ("Pls.'s Mem."), ECF Nos. 51-53.)

[1] The parties stipulated to dismiss Defendants Deborah Maino and Marisa Maino from this action. (*See* Order, ECF No. 18.)

[2] For reasons not addressed in the Report or Plaintiffs' motion papers, Plaintiffs' motion does not seek relief for minimum wage violations under the FLSA and NYLL, or spread-of-hour laws under the NYLL.

This matter was referred to Magistrate Judge James L. Cott. (ECF No. 64.) Before this Court is Magistrate Judge Cott's Report and Recommendation ("Report," ECF No. 66), recommending that this Court grant Plaintiffs partial summary judgment establishing that Plaintiffs were not paid overtime rates. (Report at 19.) That material fact is not genuinely disputed and shall be treated as established in the case. As to the other aspects of Plaintiffs' claims, the Report recommends that this Court deny summary judgment, finding there are disputed issues of fact as to Plaintiffs' eligibility for coverage under the FLSA and NYLL, Plaintiffs' claim for liquidated damages, and the amount of overtime to which Plaintiffs would be entitled. (Report at 12, 16-17, 20-22.) The Report contains no clear error of law and this Court adopts the Report.

I. LEGAL STANDARD

This Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. *See* 28 U.S.C. § 636(b)(1)(C). When no objections to a Report are made, the Court may adopt the Report if "there is no clear error on the face of the record." *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005) (internal citation omitted).

Magistrate Judge Cott advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal. (Report, at 27); *see also* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). No party has filed objections.

II. PLAINTIFFS' FLSA AND NYLL COVERAGE

To qualify for FLSA coverage, a plaintiff must show that (1) he is an employee[3] of the defendant, and (2) the defendant is an "enterprise engaged in commerce." *See* 29 U.S.C. §§ 206(a), 207(a). To establish that defendant is an "enterprise engaged in commerce," a plaintiff must show that (1) the defendant is engaged in interstate commerce, and (2) the defendant earns no less than $500,000 in annual gross volume of sales made or business done. *See* 29 U.S.C. § 203(s)(1)(A). Plaintiffs' burden is less under the NYLL, where a plaintiff must only show that he was an employee and that the defendant was his employer.[4] *See Li v. Leung,* No. 15-CV-5262 (CBA) (VMS), 2016 WL 5369489, at *8 (E.D.N.Y. June 10, 2016).

---

[3] In determining whether an employment relationship exists between the parties the Second Circuit has established four factors: whether the alleged employer "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Irizarry v. Catsimatidis*, 722 F.3d 99, 104-05 (2d Cir. 2013) (quoting *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008)).

The Report properly found there to be disputed issues of fact as to the employment relationship between the parties because (1) Plaintiffs only made vague allusions to Defendants' ability to hire and fire Plaintiffs; (2) there was no evidence of who controlled Plaintiffs' employment conditions; (3) it was unclear who was responsible for setting the rate and method of payment; and (4) it was also unclear who maintained employment records. (Report at 14-16.) Further, the Report found disputed issues of fact related to whether Defendants were an "enterprise engaged in commerce" because Plaintiffs submitted no evidence of Defendants' gross annual sales. (*Id.* at 12.)

The Report held that there are disputed issues of fact concerning whether the parties are covered by the FLSA and NYLL and therefore summary judgment should be denied as to coverage and damages. (*Id.* at 12, 16-17.) This Court finds no clear error with that recommendation.

---

[4] The NYLL relies on the same standards used under the FLSA, except that it does not require the plaintiff to show that the defendant was involved in interstate commerce or had annual gross sales not less than $500,000. *See Collado v. Donnycarney Rest. L.L.C.*, No. 14 CIV. 3899 GBD HBP, 2015 WL 4737917 (S.D.N.Y. Aug. 10, 2015) (internal citation omitted); *see also* N.Y. Labor L. § 652; 12 N.Y.C.R.R. § 142-2.2.

III. OVERTIME COMPENSATION

On summary judgment, "[i]f [the defendant] failed to compensate [the plaintiffs] properly for even one hour of overtime, liability is established. Anything else relates only to damages." *Estrella v. P.R. Painting Corp.*, 356 F. App'x 495, 497 (2d Cir. 2009). Defendants provided forms showing the number hours Plaintiffs worked during some weeks but offered no evidence that Plaintiffs were paid time and a half for weeks they worked over 40 hours. Thus, the Report properly found that Plaintiffs worked overtime hours. (Report at 19.) The Report, however, found that "[a] trial is needed to determine the total amount of damages Defendants would be liable for, contingent on Plaintiffs demonstrating FLSA and NYLL coverage." (*Id.* at 20-21.) That recommendation is proper given that there are disputed issues of fact regarding the total overtime hours Plaintiffs worked. (Report at 21.)

Thus, this Court finds no clear error with the recommendations that partial summary judgment be granted as to Plaintiffs' overtime, but denied as to the amount of damages owed.

IV. LIQUIDATED DAMAGES

The Report properly found disputed issues of fact as to Defendants' liability for liquidated damages. Plaintiffs argue that "[u]nder both the FLSA and the New York Labor Law, plaintiffs are entitled to liquidated damages equal to 100% of their actual damages." (Pls.'s Mem. at 7.) Although that is what the FLSA and the NYLL provide,[5] the court has discretion to deny liquidated damages if the employer shows that he acted in subjective good faith and objectively reasonable, despite failing to pay proper wages.[6] (29 U.S.C. § 260; *Herman v. RSR Security Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999)). The Report found that Plaintiffs failed to produce evidence beyond conclusory allegations to counter Defendants' asserted belief that they acted in good faith by taking into consideration commission payments to Plaintiffs in determining whether proper wages were paid. (Report at 24-25.) Thus, the Report properly recommended denying summary judgment as to Plaintiffs' claim for liquidated damages.

---

[5] The FLSA "presumptively awards [liquidated damages in] 'an additional equal amount,'" to damages awarded. *Gayle v. Harry's Nurses Registry, Inc.*, 594 F. App'x 714, 718 (2d Cir. 2014). Under NYLL, effective April 9, 2011, an employee would be entitled to 100% liquidated damages which is "only to be applied prospectively." *Garcia v. JonJon Deli Grocery Corp.*, No. 13-CV-8835 (AT), 2015 WL 4940107, at *5.

V. CONCLUSION

Plaintiffs' motion for summary judgment as to Plaintiffs' coverage under the FLSA and NYLL, Defendants' liability for liquidated damages, and the amount of overtime damages is DENIED. Plaintiffs' motion for summary judgment that Plaintiffs did not receive overtime pay is GRANTED. That issue shall be deemed established for trial of this case.

The Clerk of Court is directed to close the motion at ECF No. 51.

Dated: New York, New York

March 29, 2017

MAR 29 2017

SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge

[6] Under New York law, courts generally treat the federal and state good faith standard as being analogous. *See* N.Y. Lab. Law §§ 198 (1-a), 663(1).